In the High Court of Uttaranchal, at

Nainital.

S.A. No. 760/2001

(Old No. 99 of 1986)

Pulam Singh S/o Satey Singh,
R/o Bahedi, Patti Barsali
District Uttarkashi ... Appellant.

Vs.

1- Smt. Nardei W/dow of Satey Singh
R/o Bahedi, Patti Barsali,
District Uttarkashi.
2- State of U.P. through Collector
Uttarkashi ... Respondents.

Sri Rajendra Dobhal, learned counsel for the appellant.
None for the respondents.

Hon'ble B.C. Kandpal, J.

This Second Appeal has been filed by the defendant/appellant against the judgment and decree dated 15-10-1985, passed District Judge, Uttarkashi, in Civil Appeal No. 2 of 1984, Pulam Singh Vs. Smt. Nardei, arising out of Original Suit No. 11 of 1980.

2- The brief facts giving rise to the present appeal are that Smt. Nardei, respondent No.1, field a suit for cancellation of a will dated 11-1-1979 and for permanent prohibitory injunction against the defendant/appellant Pulam Singh from interfering in the possession of the plaintiff over the disputed property. According to the plaintiff Smt. Nardei Devi, her husband Satey Singh was the owner of the property including land of Khata No. 97 of Village Barethi. Satey Singh fell ill in January 1979 and was admitted in Uttarkashi Hospital. From the Hospital he was declared incurable and was taken back to Village Barethi on 9-1-1979, where he died on 15-1-1979. He

had left no issue and as such the plaintiff was his sole heir. On 10-1-1979 at about 8 or 9 P.M. when Satey was unconscious, the defendant reached the house accompanied by Sub Registrar, Clerk, some other persons and an Advocate. They wanted some document to be executed and registered but on the protest of the plaintiff they returned back. It was also alleged that the defendant Pulam Singh was the employee of Satey Singh and on 11-1-1979 he forcibly obtained the thumb mark of Satey Singh on some paper, while he was still unconscious and prepared a will. This document was not executed in full senses and no title passed on its basis. On 6.12.1979 the defendant applied for mutation and on 18-1-1980 he started selling away the land. The plaintiff, therefore, filed the suit.

3- The defendant/appellant contested the suit with the allegations that Satey Singh had no issue hence Pulam Singh, defendant, lived with him and later on Satey Singh executed a will in his favour with full understanding.

4- The learned Munsif, Purola, District Uttarkashi, on assessment of material placed on record and hearing learned counsel for the parties, decreed the suit for cancellation of the will as well as permanent prohibitory injunction. The Munsif also declared the mutation of the property in suit in favour of the defendant/appellant on the basis of the disputed will, as null and void and the defendant was directed not to interfere in the possession of the plaintiff over the land in suit.

6- Feeling aggrieved by the aforesaid judgment and order, first appeal was filed before the court of District Judge, Uttarkashi, who after hearing learned counsel for the parties and perusing the entire material on record, partly allowed the appeal, so far as the relief of injunction was concerned, and the suit was dismissed in respect of the relief of injunction, but the decree in respect of the relief of cancellation of the will was maintained.

7- The defendant/appellant has thereafter preferred this second appeal before the Allahabad High Court, which has been transferred to this court after creation of the new State.

8- Heard Sri Rajendra Dobhal, learned counsel for the appellant and perused the record.

9- From the perusal of the record it reveals that the appellant/defendant Pulam Singh had appeared before the trial court as a witness and he had admitted in his cross-examination that he was the only son of his parents and was the nephew of Satey Singh. He further admitted that no religious ceremony was ever performed about his adoption. No document was ever executed for adoption. In these circumstances he could not be deemed to the validly adopted son of Satey Singh under Hindu Adoption and Maintenance Act. So far as the execution of the will is concerned, the plaintiff disputed the will on the ground that Satey Singh was unconscious. It was also alleged that Satey Singh was a literate person, but on the so called will signature of Satey Singh were not obtained, but his thumb mark was procured. The original will was also not brought on record by the defendant. The

defendants' witnesses Budhi Singh, and Ganga Singh contradicted each other on material facts relating execution of the will. The trial court as well as the first appellate courts have dealt with these factual aspects of the case in detail.

10- Both the courts below have recorded the categorical finding that Satey Singh was unconscious or at-least incapable of understanding and, therefore, the will had not been executed with full understanding and as such it was liable to be cancelled.

11- The first appellate court also concluded that the question of possession had not been raised initially by the defendant. There is absolutely nothing on record to show that the defendant was in possession of any property in suit. Merely because the details of the property were not disclosed by the plaintiff, it would not follow that the document could not be cancelled. Even the fact that the defendant sold a part of the property would not mean that he was in possession also. In those circumstances the relief of cancellation of will could certainly be granted. Regarding the relief of injunction, the first appellate court found it vague as the details of the property were not disclosed, hence that relief was refused. I do not find any illegality or infirmity in the above finding recorded by the first appellate court.

12- Perusal of the judgments and decrees passed by both the courts below, show that all the factual aspects of the case, have been considered by them and the concurrent finding of fact has been recorded. I, therefore, don't think it just and proper to interfere with the finding of fact, recorded by both the courts

below, howsoever erroneous, it may be. I find that no substantial question of law is involved in this second appeal.

13- On the basis of the assessment of evidence on record, I come to the conclusion that this appeal does not bear any force and is liable to be dismissed.

14- Accordingly the appeal is dismissed. No order as to cost.

(B.C. Kandpal, J.)

Dated: September 08, 2006
ISB